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No. 84-1044

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY, a California corporation,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Supreme Court of the State of California

BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE, AMICUS CURIAE, IN SUPPORT OF JURISDICTIONAL STATEMENT

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INTEREST OF THE AMICUS CURIAE

The California Chamber of Commerce ("The Chamber") submits this brief in support of the Jurisdictional Statement filed by Pacific Gas and Electric Company ("PGandE"). All parties have consented.

The Chamber is a voluntary, nonprofit, California-wide business association, with more than 4,800 members from virtually every industry and geographic section in the state. Ninety percent are small or medium-size businesses. The Chamber's membership also includes 150 trade associations, and it is affiliated with and regularly communicates on current business issues with 387 local and regional chambers of commerce and more than 167,000 small businesses. The Chamber estimates that its members and affiliated local chambers employ 75 percent of the private sector work force in California.

The Chamber (a) advises its members of state and federal legislative and judicial developments; (b) appears for its members before local, state and federal legislative bodies; (c) sponsors educational seminars and commissions publications to inform its members of their obligations under the law; and (d) initiates legal proceedings to protect the interests of its members.

The Chamber, on behalf of its members and affiliates, is vitally interested in the issues involved in this case. The decision of the California Public Utilities Commission ("Commission") poses a threat to fundamental rights of property and expression. Accordingly, The Chamber respectfully urges the Court to note probable jurisdiction.

SUMMARY OF ARGUMENT

The Commission's decision prevents PGandE from using its billing envelopes to communicate with its customers. This vio-

lates PGandE's First Amendment right to speak. Consolidated Edison Co. v. Public Srv. Comm'n., 447 U.S. 530 (1980); Central Hudson Gas & Electric Corp. v. Public Srv. Comm'n, 447 U.S. 557 (1980).

The restriction cannot be justified as a narrowly tailored means of serving a compelling state interest. First, the state interest the Commission identifies, increasing consumer participation in Commission proceedings, is simply not a compelling interest. Second, the means chosen to serve that interest are only indirectly related to it, and there are superior alternatives which the Commission did not consider.

The Commission's decision is not a reasonable time, place or manner restriction either. The decision does not restrict PGandE's speech because its time, place or manner is disorderly or invades the rights of others. Rather, the decision restricts

PGandE's speech so that it can be replaced in the same time, place and manner by the speech of others who will express different opinions. That is content regulation, not time, place or manner regulation, and it violates the First Amendment.

The Commission's decision also forces PGandE to publish the opinions of its adversary with which it disagrees. This is a plain violation of PGandE's right not to speak. Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

Finally, the Commission's decision cannot be justified on any theory that PGandE's ratepayers, rather than PGandE itself, own the billing envelope space. Ratepayers pay for and receive service; they do not also acquire an ownership or equity interest in the utility's property. Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23 (1926).

ARGUMENT

I. The Commission's Decision Abridges PGandE's First Amendment Rights

The Commission's decision restricts PGandE's right to mail its newsletter, Progress, to its customers, as PGandE has done for 60 years. The decision also forces PGandE to send to its customers messages prepared by its adversary. This order violates PGandE's First Amendment rights.

A. The Decision Violates PGandE's Right to Free Speech

1. The Order Is Not a Narrowly Tailored Means Of Serving a Compelling State Interest

This Court's decision in Consolidated Edison Co. v. Public Srv. Comm'n., 447 U.S. 530 (1980) is a square holding that a state may not constitutionally prevent a public utility from using its billing envelopes to communicate with its customers. This decision is dispositive, and sets the standard by which the Commission's order must be judged:

> Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.

Id. at 540. The Commission cannot show either a "compelling state interest" or that its order is a "precisely drawn means."

The Commission says the state interest "is the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." (Dec. 83-12-047, p. 29, App., p. 22, quoting Dec. 83-04-020, p. 17, App., p. 103)1/ In other words, the Commission wants to enhance consumer information and power vis-a-vis PGandE. The Commission does not explain why that is a compelling interest that can override free

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1/ Citations are to both the slip opinions and to the appendix to the Jurisdictional Statement.

speech, and it is not. In Buckley v. Valeo, 424 U.S. 1 (1976) the Court found the state interest in balancing political power to be insufficient to justify restrictions on campaign expenditures, and said

> But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .

Id. at 48-49. That is directly applicable here. The Commission offers no answer to it.

Nor is the Commission's means of achieving its goal carefully tailored. The Commission asserts that a "shared approach to use of the extra space," (Dec. 83-12-047, p. 30, App., p. 22) constitutes a sufficiently narrow regulation, but that is simply an unsupported conclusion. In fact, publication of TURN's messages may well not increase consumer participation in Commission proceedings. Therefore, the Commission's order is defective because it does not "directly advance the

state interest involved." Central Hudson Gas & Electric Corp. v. Public Srv. Comm'n, above, 447 U.S. at 564.

Moreover, there are obvious superior alternative means of increasing consumer participation in regulatory proceedings that do not entail any restrictions on utility speech.2/ The Commission's decision does not even consider them. Therefore, the decision's "restrictions are excessive and cannot survive." Id. at 564-66.

2. The Order Is Not a Reasonable Time, Place or Manner Restriction

Consolidated Edison embraced an alternative test which the Commission claims justifies its order. The Court "recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample

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2/ For example, allowing attorneys' and intervenors' fees to consumers who intervene and participate in regulatory proceedings.

alternative channels for communication." Consolidated Edison, 447 U.S. at 535. However, a valid time, place, or manner restriction may not be based upon the content or subject matter of the speech. (Id. at 536): As the Court said:

> [T]he essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares at 2 a.m. disturbs neighborhood tranquility.

Id. (emphasis added).

Thus, time, place or manner restrictions on the method of speech have been permitted in a few well-defined circumstances where necessary to protect against "substantial disorder or invasion of the rights of others."3/ No case has held that the time,

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3/ Tinker v. Des Moines School Dist., 393 U.S. 503, 513 (1969) (school may not punish students for wearing black protest armbands). See also Grayned v. City of

(Footnote 3 continued on page 10)

place or manner doctrine may be used offensively, as here, to give another party a right it would not otherwise have.

Moreover, the Commission's order fails to satisfy the requirement that time, place, or manner regulations be "applicable to all speech irrespective of content." Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975). The Commission's claim that its decision "is neutral as to content of the parties messages" (Dec. 83-12-047, p. 28, App., p. 21), is not true. It has substituted consumer messages for utility viewpoints precisely because it anticipates the

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(Footnote 3 continued from page 9)

Rockford, 408 U.S. 104, 118 (1972) (anti-noise regulation to maintain order of education facility constitutional); United States v. O'Brien, 391 U.S. 367, 377 (1968) (statute prohibiting destruction of draft card is constitutional); Cox v. Louisiana, 379 U.S. 536, 554 (1965) (licensing requirement for parades to regulate traffic constitutional).

content will be different. (Dec. 83-12-047, pp. 21-23, App., pp. 16-17) The Commission is allowing TURN to speak in the very same time, place and manner that it is not allowing PGandE to speak, and is restricting "expression because of its message, its ideas, its subject matter, or its content." Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Thus, the Commission's "own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation." Consolidated Edison, above, 447 U.S. at 537.

B. The Decision Violates PGandE's Right to Refrain from Speaking

The Commission acknowledges that Wooley v. Maynard, 430 U.S. 705 (1977) and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) stand "for the clear proposition that the First Amendment right to free speech also includes the right to refrain from speaking and the right not to be com-

pelled by government to publish that which one does not wish to publish." (Dec. 83-12-047, p. 30, App., p. 23) The Commission's sole response is as follows:

> This argument . . . assumes that we are asking PGandE to publish the messages of TURN or others. In fact . . . we are simply ordering PGandE, which has physical control over the billing space, to make it available for the benefit of ratepayers. We are not asking PGandE to publish anything as its own.

(Dec. 83-12-047, p. 30, App., p. 23, as modified by Dec. 84-05-039, p. 8, App., p. 51)

What this means is not clear. If it means that PGandE has no First Amendment interest because it does not own the space in the envelopes, it is simply wrong. (Section II, below)

If it means that requiring PGandE simply to mail TURN's materials to customers does not force it to "publish" anything, it makes the First Amendment meaningless. The point of the First Amendment in this application is that a person may not be forced actively

to assist in the dissemination of the opinions of others. That is precisely what the Commission's decision does to PGandE, and it is precisely what Miami Herald and Wooley forbid.

Finally, if the Commission means that its order is proper because PGandE is not required to publish TURN's opinions as its own, it again misses the point of Miami Herald and Wooley. The concern in those cases was not that anyone was required to misrepresent his own opinions by publishing someone else's views as his own.4/ The concern in Wooley was with requiring a person "to participate in the dissemination of an ideological message" and to become "the courier for such message," 430 U.S. at 713,

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4/ In Miami Herald the statute required publication of replies to the publisher's own materials. No one would have thought the newspaper was the source. In Wooley, the message was to appear on every license plate in the state. Again, it was obvious that the message was not that of each car owner.

717. In Miami Herald, the concern was with compelling publication of material that editors and publishers do not wish to publish, thereby interfering with their editorial judgment as to the size and content of the publication. 418 U.S.at 258. Those same concerns are present here; the Commission does not even mention them. Its decision violates the First Amendment.

II. The Decision Cannot Be Justified On The Theory That Ratepayers Own The Space In PGandE's Billing Envelopes

The Commission reasons that since the cost of mailing bills is recovered in PGandE's rates, any "extra space" in the envelopes is ratepayer property. (Dec. 93887, p. 220, App., p. 72) Then, "since that [extra billing envelope] space is not the property of PGandE in the first place, it has no right to use the space for First Amendment purposes." (Dec. 83-12-047, p. 30, App., p. 22) This is dead wrong.

A. Ratepayers Do Not Own the Space in the Billing Envelopes

The ratepayers do not "own" PGandE's billing envelopes or the "extra space" in them or any of the property a utility acquires with revenues from rates. Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23 (1926) is directly on point. In holding that the ratepayers were not entitled to the benefit of an admittedly excessive depreciation reserve, the Court said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stock.

271 U.S. at 32. The Court has never deviated from this principle. Indeed, in Consolidated Edison Co. v. Public Serv. Comm'n,

above, 447 U.S. at 540, the Court held that the State could not prevent the utility from utilizing "its own billing envelopes to promulgate its views on controversial issues of public policy." Id. at 540. (emphasis added)

The Commission's decision cannot be reconciled with these decisions or with their controlling principle.

B. The Decision Is Insupportable

The Commission's decision is without any coherent principle and its premise is factually incorrect. The Commission seems to be as much concerned that PGandE not benefit from any extra space as it is that the ratepayers do benefit from it, for it supports its holding by arguing that PGandE would be unjustly enriched if it were permitted to use the "opportunity" value of the extra space. (Dec. 93887, pp. 159b-59c, 220-20a, App. pp. 67-68, 72; Dec. 83-12-047, pp. 4-5, 34-35, App., pp. 3, 27; Dec. 84-05-039,

pp. 2-3, App. p. 46) Indeed, the Commission sometimes concedes that the extra space is not really ratepayer "property", saying instead that the ratepayers have an "equity right." (Dec. 83-04-020, p. 14, App., p. 100; Dec. 83-12-047, pp. 5-6, App., p. 4)

The Commission's incomprehensible rationale is only one of the problems with its attempt to redefine the basic relationship between PGandE and its ratepayers. There are many others, and the Commission does not come to grips with any of them.

First, the Commission focuses on only one item of PGandE's total costs and revenues. How is PGandE unjustly enriched if its overall rate of return is just and reasonable?

Second, the Commission's conclusion that ratepayers bear the cost of mailing the billing envelopes is based upon projected rather than actual costs. The ratepayers

don't <u>actually</u> pay for the "extra" space because the true mailing costs exceed projections. (Dec. 83-12-047, pp. 12-13, App., p. 9) Thus, the Commission's analysis is a purely theoretical construct, and its premise is contrary to fact.

Third, although the Commission acknowledges that PGandE's <u>Progress</u> contains information of value to the ratepayers (Dec. 93887, p. 159e, App., p. 69), it merely alludes to this other side of the ledger (<u>Id.</u>), without giving PGandE any credit for this value that it provides the ratepayers free of charge. (<u>Id.</u> at 159a, App. p. 66)

Fourth, if inclusion of mailing costs in rates makes the extra envelope space belong to the ratepayers, does everything else paid for from rates also belong to them? Virtually all of a utility's physical property has "extra" potential economic value at least as advertising space. And are rate-

payers entitled to use the after-hours "extra" capacity of utility offices and vehicles?

Fifth, does this "equity right", whatever it is, apply to unregulated business activities as well? If any firm's charge to its customers recovers the cost of billing or other handling, and that charge contains an "extra value," do the customers own the extra value or have an "equity right" in it?

The Commission's confused decision is a radical departure from established principles. This Court should review it to restore order to this important area of the law.

CONCLUSION

The Commission's action in this case strikes at the heart of fundamental First

Amendment values. This Court should note probable jurisdiction and reverse it.

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January 23, 1985.

CERTIFICATE OF SERVICE BY MAIL

JOHN R. REESE certifies:

1. That his name is John R. Reese and he is counsel of record for The California Chamber of Commerce, and that he is a member of the Bar of the Supreme Court of the United States.

2. That on January 23, 1985, he served all parties required to be served by placing 3 copies of the foregoing BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE, AMICUS CURIAE, IN SUPPORT OF JURISDICTIONAL STATEMENT in envelopes and depositing them in the United States mail, with first-class postage fully prepaid, at San Francisco, California to:

Janice E. Kerr
Mark Fogelman
Diane I. Fellman
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Executed at San Francisco, California, on January 23, 1985.

JOHN R. REESE

John R. Reese